FILED
JUN 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1345

IN THE

Supreme Court of the United States

MIPRO HOMES, L.L.C. and
BUILDERS LEAGUE OF SOUTH JERSEY, INC.,

Petitioners,

v.

MOUNT LAUREL TOWNSHIP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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OBJECTION TO PETITION FOR A WRIT OF CERTIORARI

Mount Laurel Township (hereinafter "Township") respectfully responds and objects to the Petition for a Writ of Certiorari.

STATEMENT OF JURISDICTION

Jurisdiction pursuant to 28 U.S.C. § 1257(a) should not be invoked. There were no federal questions presented below. All State court decisions were based upon New Jersey law. Mount Laurel Township (hereinafter "Township") articulates its objection to the Court's jurisdiction pursuant to Rule 15.4.

CONSTITUTIONAL PROVISION INVOLVED

Petitioners assert violation of the Fifth Amendment to the United States Constitution. The assertion itself is new to this litigation. The Fifth Amendment has not previously been asserted or argued in any pleadings or subsequent briefs filed in any New Jersey court.

All decisions below referenced the eminent domain statute of the State of New Jersey, State court decisions applying the statute and recently adopted preservation of land statutes.

There are no statutes of the United States, constitutional provisions or treaties of the United States affecting this matter.

STATEMENT OF THE CASE

Pursuant to the Township's open space acquisition program, the Township determined to preserve the property involved here. The preservation will be in perpetuity. The matter was initiated by the Township's complaint condemning the property. No issues were raised by the condemnee regarding just compensation provisions of either federal or New Jersey law. Summary judgment was entered in favor of condemnee because the trial court determined the taking to be in bad faith. The Township appealed to the New Jersey Superior Court, Appellate Division. The Township's brief to that court included a demonstration of extensive errors of fact and law articulated by the trial court. The Superior Court, Appellate Division reversed the Law Division. Defendant appealed to the New Jersey Supreme Court. The State's highest court sustained the Appellate Division in a Per Curium decision. All opinions are in the Appendix.

REASONS FOR DENYING THE PETITION

The greatest portion of State law applied below is statutory. None of those statutes, their purposes or their requirements are addressed or mentioned in the Petition.

Petitioners have not previously asserted a taking without just compensation. In fact, just compensation aspects of this case have not yet been reached.

The New Jersey Supreme Court determined the property was taken for a public use and a public purpose. It did so because of land preservation statutes adopted by New Jersey.

A. The New Jersey Preservation Statutes.

Three separate State statutes support the taking. Two of the three were adopted soon before the Township's pursuit of this property. These two statutes are open space preservation enactments by the country's most densely populated State. The third, the New Jersey Eminent Domain Act, N.J.S.A. 20:3-1 *et seq.* is the general condemnation statute of the State.

N.J.S.A. 40:12-15.1 *et seq.* was adopted in 1997. Often referred to as the Referendum Law, it gives to municipalities and counties the right to seek approval for a dedicated tax to acquire "lands for recreation and conservation purposes;" N.J.S.A. 40:12-15.7. The dedicated tax must be approved by a majority of voters at a November general election. In the Referendum Law, supra, "acquisition" is defined:

> The securing of a fee simple or a lessor interest in land, including but not limited to an easement restricting development, by gift, purchase, installment purchase agreement, devise, *or condemnation.*

Emphasis added. N.J.S.A. 40:12-15.1.

N.J.S.A. 13:8C-1 *et seq.*, the New Jersey Preservation Trust Act, was adopted in June 1999. The legislative purpose provisions assert, in part:

> The Legislature *finds and declares* that enhancing the quality of life of the citizens of New Jersey is a *paramount policy* of the State; that the acquisition and preservation of open space,

> farmland and historic properties in New Jersey protects and enhances the character and beauty of the State and provides its citizens with greater opportunities for recreation, relaxation and education; that the lands and resources now dedicated to these purposes will not be adequate to meet the needs of an expanding population in years to come; that the open space and farmland that is available and appropriate for these purposes will gradually disappear as the costs of preserving them correspondingly increase; and that it is necessary and desirable to provide funding for the development of parks and other open space for recreation and conservation purposes.

Emphasis added. N.J.S.A. 13:8C-2.

Also asserted is:

> The Legislature further finds and declares that the citizens of the State have indicated their very strong support for open space, farmland, and historic preservation efforts not only in the past approval of State Green Acres bond acts and numerous county and municipal dedicated funding sources for those purposes, *but most recently in 1998 with the approval of an amendment to the New Jersey Constitution that provides for a stable and dedicated source of funding for those purposes for the next decade and beyond.*
>
> *The Legislature therefore determines that it is in the public interest to preserve as much open space and farmland, and as many historic properties,*

> *as possible within the means provided by the 1998 constitutional amendment*; that, in recognition of the recommendations of the Governor's Council on New Jersey Outdoors, it is a worthy goal to preserve one million more acres of open space and farmland in the Garden State in the next decade to protect the quality of life for New Jersey residents; and that, to accomplish that goal, it is also in the public interest to create the Garden State Preservation Trust and to enable it to raise revenue for those purposes, and to delegate to it such other duties and responsibilities as shall be necessary to further the purposes of the *constitutional amendment* and to advance the policies and achieve the goals set forth in this preamble.

Emphasis added. N.J.S.A. 13:8C-2.

The Act provides a slightly different definition of "acquisition":

> The obtaining of a fee simple or lessor interest in land, including but not limited to a development easement, a conservation restriction or easement, or any other restriction or easement permanently restricting development, by purchase, installment purchase agreement, gift, donation, *eminent domain* by the State or *a local government unit*; . . .

N.J.S.A. 13:8C-3 (emphasis added).

These land preservation statutes form the foundation of the lower courts' determinations of correctness of the acquisition here, i.e., preservation of open space is a valid public purpose in New Jersey. Petitioner's asserted comparisons of New Jersey law to the law of other States fails to include or mention New Jersey's statutory language or its purposes. The Petition's suggestion of resolving inconsistencies among various States' laws is therefore not based upon any analysis of relevant statutes, whether from New Jersey or from any other State.

B. The Township Had A Comprehensive Plan.

Petitioners repeatedly assert the Township had no "comprehensive plan." The quoted language comes from *Kelo, et al. v. City of New London, et al.*, 545 U.S. 469 (2005). *Kelo* found a proper public purpose in the pursuit of economic revitalization by New London, Connecticut. In *Kelo*, the Court reviewed—or rather the Court noted with approval—the comprehensive plan pursued by New London. Relevant Connecticut statutes reveal that New London's "plan" followed the recipe required.

Petitioner's assertion about the absence of a plan here is entirely incorrect. The Township's plan is based upon the New Jersey preservation statutes aforementioned and regulations pursuant thereto at N.J.A.C. 7:36-1.1 *et seq*. The Township properly pursued, and achieved, full compliance with every requirement. The Township's plan was achieved through the required process, is complete and as comprehensive as required. These required planning activities and procedures included:

1. The Township placed three separate ballot referenda before its voters in November of 1998, 2001 and 2002, each referendum created pursuant to procedures required at N.J.S.A. 40:12-15.1 *et seq*. All three referenda were approved. Voter approval is an initial procedural component required, N.J.A.C. 7:36-5.1(b)(5).

2. In November 1998 two other—i.e., two additional—ballot questions were on the general election ballot. Each question addressed land preservation issues. The first was a referendum, also pursuant to N.J.S.A. 40:12-15.1 *et seq*., by Burlington County, where the Township is located. The County referendum appeared on every ballot within the County's 40 municipalities. The second was a ballot question on every ballot in New Jersey. If passed, the vote created an amendment to the New Jersey Constitution for a more permanent funding source for land preservation. All the November 1998 ballot questions (Township, County and State) were passed by Township voters. Within Burlington County, the County referendum passed. Statewide, the amendment to the State Constitution was approved. Thereafter, the State adopted N.J.S.A. 13:8C-1 *et seq*. The public policy section at N.J.S.A. 13:8C-2 is quoted at length, supra.

3. The Township retained a consulting firm to assist in the creation of a proper and "comprehensive" plan pursuant to State law. The plan's completion and adequacy is a required component of a municipality's application for admission to New Jersey's Green Acre Program.

4. The Township created its Open Space Recreation Plan (OSRP), the planning document defined at N.J.A.C. 7:36-2.1:

> "Open Space and Recreation Plan" means the plan developed by a local unit that identifies *existing*

> *and potential* open space preservation and recreation opportunities in a municipality, county, or region *and* that is *reviewed and approved* by Green Acres for purposes of qualifying a project under the grant incentive project category described at N.J.A.C. 7:36-5.1(b)5.

Emphasis added.

5. Public hearings were held on the Township's OSRP per State requirements and adjustments made to the OSRP as a consequence of those public hearings.

6. The Township applied for admission into the New Jersey Department of Environmental Protection's Planning Incentive Grant Program, a portion of the State's Green Acre programs.

7. The Township was admitted into the program, becoming eligible for State funding to assist with the cost of open space acquisition/preservation.

8. The Township was awarded (by Green Acres of the State of New Jersey) Four Hundred Thousand ($400,000.00) Dollars *toward the acquisition of this very property*. For any municipality to receive funding from the State, the parcel acquired, including this one, must have been on the OSRP, the subject of a comprehensive inspection at which the property owner was, in this case, present, two appraisals prepared pursuant to Green Acre requirements, inspections, environmental assessments, freshwater wetland analysis, etc. The proofs presented below were detailed, demonstrating Township compliance with requirements.

Petitioners apparently argue that because the OSRP here, for open space preservation in New Jersey, is a qualitatively different type of plan than the one required by Connecticut for redevelopment, that somehow the Township's open space plan (OSRP) here is not a comprehensive plan.

Petitioners also request the Court to make a detailed re-determination of facts upon which the Petition itself relies, i.e., the existence of "ad hoc," "pretextural" and "bad faith" actions. The argument, from the Question Presented on the Petition's first page and thereafter, is focused upon these words: "ad hoc," "pretextural" and "bad faith." The argument was made below, compared to the facts in the record, and rejected. It is not a proper issue before the Court.

C. *Kelo v. New London*

The Court determined in *Kelo*, supra, that the City of New London, in pursuing a plan that served a public purpose, satisfied the Fifth Amendment. Here, it is no different. The Township has followed State law and, by doing so, has met the Court's "public purpose" test. In *Kelo*, New London was following Connecticut's statutory scheme. Justice Stevens recited that the Connecticut statute "expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a 'public use' and in the 'public interest,'" *Kelo* at 476. The Supreme Court of New Jersey has done the same here.

The issues in *Kelo* and the issues here are meaningfully different. The issue here is whether a densely populated State may take action to preserve open space, agricultural land, etc. Land acquired pursuant to New Jersey's preservation statutes (and the land acquired here) is owned and maintained perpetually *by the public entity* preserving the land. In *Kelo*, the Court was

grappling with issues of publicly acquired land provided to a third, private party to enable the land's economic redevelopment. New Jersey also has a line of cases addressing private beneficiaries of eminent domain. However, those issues are not here. The Township will own, maintain and preserve the property acquired perpetually, thereby fulfilling the policy considerations set forth at N.J.S.A. 13:8C-2, *supra*. New Jersey has clearly made its legislative determination. It deserves deference.

D. *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

Petitioners ask the United States Supreme Court to note that 24 years ago the Township violated public policy in this landmark New Jersey case. The issue so presented by Petitioners is entirely irrelevant to the matter before the Court. Nevertheless, the Township does not want an absence of comment to be misconstrued.

Therefore, the Court is respectfully informed that the Township has been in full compliance with all New Jersey affordable housing requirements since 1985. The courts of New Jersey control the Township's compliance with the 1983 *Mount Laurel* decision, supra, (and the very substantial statutes and regulations the decision generated). Over the last twenty-one years, these courts have repeatedly determined Mount Laurel Township to be in full compliance with all requirements.

Petitioners' utilization of this old decision is unfortunate. It is presumably articulated to bring a reader to a conclusion unrelated to the merits of the Petition, i.e., that the Township is somehow institutionally unprepared to comply with legal requirements. Such an approach appears argumentative and obviously inconsistent with the Court's requirement for a concise presentation.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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